Time, gentlemen, time

Time, gentlemen, time, The date for the Court hearing on the minimum price on alcohol legislation is getting near!

Posted on January 11, 2013 by admin

2013 has started in earnest for the Scotch Whisky Association and the Scottish Health Minister: the challenge against the Scottish Parliament's legislation imposing a minimum price on alcohol beverage is due to be heard on 15 January for seven days. However, according to court sources, the applicants have dropped their claim that the act infringes the Scotland Act, having allegedly been enacted beyond the scope of the powers conferred to the Holyrood Parliament by the devolution legislation. Their arguments will therefore seek to convince the Court of Session that the measure in question represents an unwarranted restriction on the freedom of movement principles and an infringement of the competition rules, enshrined in the EU treaties. How is one to read the change of heart of the SWA? And what is this going to mean for the complaint lodged by the SWA and other bodies before the EU Commission and alleging an infringement of the Treaty by the UK in respect to the Alcohol Minimum Pricing (Scotland) Act?

In respect to the former question, it could be suggested that the recent UK Supreme Court judgment confirming the legality of Scottish legislation banning the presence of vending machines of tobacco products in publc places may have convinced the applicants against pursuing their pleas based on the Scotland Act. In December 2012 the Supreme Court upheld the validity of Sections 1 and 9 of the Tobacco and Primary Medical Services (Scotland) Act 2010: these provisions had banned, respectively, the display of tobacco products in placed where the latter were on offer for sale and the presence of vending machines for the sale of the same goods. Imperial Tobacco had sought to have the measure declared incompatible with the Scotland Act on the ground that, being allegedly related to "product safety" and to "the sale or rupply of goods to consumers" they affected areas reserved to the Westminster Parliament. In addition, the appellant argued that, in as much as they provided sanctions for the infringement of these prohibitions, they had created "new offences", and were therefore also incompatible with the 1998 Act.

The UK Supreme Court, however, held that the purpose of sections 1 and 9 was not to regulate either the conditions of sale and supply of goods to consumers or the safety of specific products. Instead, it was stated that the act should have been read with a view to identifying its purpose and, thereafter, to examining whether, in light of the scheme of the 1998 Act, the Scottish Parliament had overstepped the limits of its powers in this specific case. The Court unanimously found against the appellant. It took the view that the objective of Sections 1 and 9 of the 2010 Act had been, respectively, to limit the "visibility" of tobacco products, with a view to reducing consumption and smoking and to make cigarettes less available to the public, especially to children and young people. At the core of both provisions, therefore, was a concern for discouraging the consumption of tobacco, in order to, ultimately, secure health protection objectives. The UK Supreme Court, therefore, rejected the appellant's claim that these provisions affected the Westminster Parliament's power to legislate for either the purpose of regulating the sale or supply of goods or indeed of enforcing appropriate product safety standards. In particular, the Court sought to read the latter objective carefully and expressed the view that its scope should be limited to the remit of section 11 of the Consumer Protection Act, i.e.devising and upholding appropriate safety standards especially so as to prevent that "dangerous" or "unsafe" goods do not end up in the hands of specific categories of individuals (or indeed of the public at large).

On tha basis, the Supreme Court rejected the applicant's challenge on the ground that the 2010 Act had not sought

to prohibit outright the sale of tobacco products and was therefore incapable of "unbalancing" trading in these goods. Thus, it was held that, since the purpose of Sections 1 and 9 of the 2010 was to promote public health by reducing the attractiveness and the availability of the tobacco products and esopecially to put it beyond the reach of persons that are not "old enough" to purchase them, they could be rightly adopted by the Scottish Parliament. Having regard especially to its provisions imposing criminal sanctions for the infringement of Section 9, the Court explained that these too should be read having in mind the public health concerns at the basis of the 2010 Act: in its view, these sanctions were geared at reinforcing the deterrent effect on consumption of the ban on display of tobacco products or on the installation of vending machines, i.e. public health, and not at securing the "safe" supply of specific goods.

Against this background, and given especially the broad similarities between the arguments laid out by, respectively, the SWA and the pleas rejected by the Supreme Court in the November judgment, it is not surprising that the Whiskey producers' trade body decided to drop the 'devolution arguments' in advance of next week's hearing: in the appeal, the SWA had argued that the minimum pricing legislation affected matters reserved to the Westminster parliament, i.e. the regulation of the sale and supply of goods and services to consumers (see: http://www.bbc.co.uk/news/uk-scotland-20028728). As a result, and in consideration of the public health rationale underpinning the 2012 Act, it may be foreseen that this argument would be unlikely to succeed in the Court of Session.

It shoud be added that the decision adopted by the Court of Session to allow Alcohol Focus Scotland to intervene in the public interest in support of the introduction of alcohol MPUs may stoke up the chances of the Scottish Goverment succeeding on this ground: according to Lord Hodge the court would be likely to derive assistance from the submissions made by the petitioner, on the ground of its expertise and its role of "independent voice" in Scotland for the public health concerns raised in the face of alcohol abuse. Thus, it could be argued that ACS's participation seems to confirm the 'public health-centric' nature of the Sottish Parliament's statute.

So, the SWA's pleas are now focused exclusively on the EU law-based arguments that the 2012 Act would infringe the competition and single market rules enshrined in the Founding Treaties. This development, however, opens up a number of interesting scenarios: the Court of Session could decide to rule on these questions straightaway. It is in fact not a 'court of last resort' and it is open to the parties to challenge its decision and thereby seek to have the Court of Justice involved at a later stage of the proceedings via Article 267 TFEU, i.e. the preliminary reference procedure. If this was the case, however, and the case proceeded all the way to the UK Supreme Court, it may take a considerable time for these questions to arrive in Luxembourg. Or the Court of Session may decide to suspend proceedings and refer one or more questions to the Court of Justice already at this stage: seeking a reference at this point in time may appear more favourable to both parties, since it would secure a more timely resolution of the dispute and increase legal certainty in a cloudy area of free movement and competition law.

However, if this was the preferred solution of the Court of Session, what would happen to the complaint lodged by the SWA with the EU Commission? It is reminded that in December 2012 the Daily Mail had leaked a memorandum of the Secretary General of the Commission (see http://www.bbc.co.uk/news/uk-scotland-scotland-politics-20533189) in which it had been stated that, while the objectives pursued by the 2012 act could be "made to fit" within the broader framework of the goals pursued by the EU in the field of public health, the "proportionality" of the restrictions carved by the introduction of compulsort MPUs was under considerable doubt. However, it is to this day not clear whether and when the Commission will take action in court against the UK-as is well known this is very much the gift of the Commission itself and its discretionality in this area remains unfettered. Seen in this light, it may be argued that the way in which the Court of Session will deal with the EU law questions before it may have an impact on the Commission's decision in this area: it is in fact well known that, at least in the area of competition enforcement, the fact that a specific case is pending before a domestic court may constitute sufficient ground for the Commission to "drop a complaint" concerning the same set of facts.

Consequently, it may legitimately be argued that a possible decision of the Court of Session to either examine the legislation's validity by itself or, perhaps most importantly, to refer the matter to the Court of Justice could prompt the Commission to dismiss the complaint on the basis of the same approach.

Detractors of the Scottish Parliament's legislation in this area may argue that the Commission should in any event push ahead with the infringement proceedings against the UK, on the grounds of the "novelty" and importance of the question and of the "Union interest" in upholding free movement and competition principles against a statutory attempt to set a "floor price", albeit for prima facie meritorious reasons. However, there are equally weighty reasons for cautioning against the Commission taking any "rushed decisions" on this issue: the fact that the Court of Justice may at some point be called upon to decide on these questions, and consequently the risk of the Commission itself adopting decisions that may be incompatible with a future preliminary ruling, should be regarded as sufficient ground for, at the very least, sitting it out until the Court of Session has at least heard the SWA's challenge.

In light of the above, it is clear that next week's hearing will not ring the "time, gentlemen, time" bell for (off license purchasing) drinkers... surely not, but it is equally certain that the 2012 Act imposing minimum price per alcohol unit still hangs in the balance of a very politically charged and economically weighty dispute.
